IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALEXANDER SETCHKO	:	CIVIL ACTION
	:	
v.	:	
	:	
TOWNSHIP OF LOWER SOUTHAMPTON, et al.	:	No. 00-3659

MEMORANDUM AND ORDER

J. M. KELLY, J. **MARCH , 2001**

Presently before the Court is the Motion to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), of Defendants, the Township of Lower Southampton ("Lower Southampton"), the Lower Southampton Township Police Department ("Police Department"), Police Officer Matthew Bowman ("Bowman") and Police Corporal Pennington ("Pennington") (collectively referred to as "Defendants"). Defendants seek to dismiss several counts of the Complaint filed by Plaintiff, Alexander Setchko ("Setchko"). Specifically, Defendants seek to dismiss: (1) all claims against the Police Department; (2) the claims under 42 U.S.C. §§ 1985(3) and § 1986 (1994) in Count I; (3) the Eighth Amendment to the U.S. Constitution claim in Count II; (4) all state tort claims against Lower Southampton in Count II; (5) the malicious abuse of process and malicious prosecution claims against Bowman and Pennington in Count II; and (6) Counts III and IV of the Complaint.

I. BACKGROUND

Accepting as true the facts alleged in the Plaintiff's

Complaint and all reasonable inferences that can be drawn therefrom, the facts of the case are as follows.[1] On August 15, 1998, Setchko was on the premises located at 600 Old Street Road in Trevose, Pennsylvania. Bowman and Pennington arrested Setchko in front of his friends and charged him with criminal trespass, resisting arrest, public drunkenness and disorderly conduct. Setchko alleges that Bowman and Pennington lacked probable cause to arrest him and, subsequent to his arrest, assaulted and battered him. Setchko remained incarcerated from August 15, 1998 until August 17, 1998 pending his posting of $25,000.00 bail. The criminal charges against Setchko were ultimately terminated in his favor.

In Count I of his complaint, Setchko claims violations of 42 U.S.C. §§ 1983, 1985(3), and 1986 and alleges that he was illegally detained for an unreasonable period of time in violation of the Fourth Amendment to the U.S. Constitution, was subjected to cruel and unusual treatment in violation of the Eighth Amendment to the U.S. Constitution, was deprived of his liberty without due process of law in violation of the Fifth Amendment to the U.S. Constitution, was deprived of counsel in violation of the Sixth Amendment to the U.S. Constitution and was

[1] Setchko's Response to the Motion to Dismiss appears to contain numerous and substantial allegations not contained in the complaint. Setchko has not moved for leave to file an amended complaint, accordingly, the Court's analysis is limited to the facts and inferences from Setchko's Complaint.

denied these rights through the application of the Fourteenth Amendment to the U.S. Constitution.

In Count II, Setchko alleges that the conduct of the defendants constituted assault and battery, false arrest, false imprisonment, malicious abuse of process, malicious prosecution, intentional infliction of emotional distress, negligent infliction of emotional distress, defamation of plaintiff's good name, reputation and character, and otherwise constituted willful, wanton and reckless misconduct.

In Count III, Setchko alleges that the failure of the Township and the Police Department to take effective and appropriate action to stop such acts and discipline the officers responsible therefor deprived plaintiff of, and manifested a deliberate indifference to, the rights, privileges and immunities secured for plaintiff under § 1983 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In Count IV, Setchko alleges that the actions of Defendants Bowman and Pennington deprived Setchko of, and manifested a deliberate indifference to the rights, privileges and immunities secured by § 1983 and the Equal Protection Clause of the Fourteenth Amendment. Setchko seeks compensatory and punitive

damages.[2]

II. STANDARD OF REVIEW

In considering whether to dismiss a complaint for failing to state a claim upon which relief can be granted, the court may consider those facts alleged in the complaint as well as matters of public record, orders, facts in the record and exhibits attached to the complaint. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1391 (3d Cir. 1994). The court must accept those facts as true. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Moreover, the complaint is viewed in the light most favorable to the plaintiff. See Tunnell v. Wiley, 514 F.2d 971, 975 n.6 (3d Cir. 1975). In addition to these expansive parameters, the threshold a plaintiff must meet to satisfy pleading requirements is exceedingly low; a court may dismiss a complaint only if the plaintiff can prove no set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

A. Police Department Liability

[2] Punitive damages are not recoverable against a municipality under a § 1983 claim. Newport v. Fact Concerts, Co., 453 U.S. 247, 259 (1981). Defendants also assert that, under Newport, punitive damages are not recoverable against a municipality under § 1985, § 1986, and state tort claims. However, since the municipality is immune from the state tort claims, and the complaint fails to sufficiently plead § 1985 and § 1986 claims, the Court will not address that question.

A police department without a corporate existence separate from that of its municipality is not a legal entity amenable to suit. Johnson v. City of Erie, 834 F. Supp. 873, 878-79 (W.D. Pa. 1988). Because there are no allegations that the Police Department has a separate corporate existence from that of Lower Southampton, the Police Department is dismissed as a Defendant in this suit.

B. The Eighth Amendment

The Eighth Amendment does not attach until there has been a formal adjudication of guilt. Ingraham v. Wright, 430 U.S. 651, 664 (1977). In light of the history of the Amendment and the prior decisions of the U.S. Supreme Court, the prohibition of cruel and unusual punishment was designed to protect those convicted of crimes. See id. Because Setchko was not a convicted criminal at the time of the alleged incident, his Eighth Amendment rights had not yet attached. Setchko argues that the protections of the Eighth Amendment are incorporated into the due process clause of the Fourteenth Amendment, and, thus, Setchko's Eighth Amendment claim is valid. It is true that the Third Circuit, in Kost v. Kozakiewicz, 1 F.3d 176, 188 n.10 (3d Cir. 1993), noted that "pretrial detainees . . . are entitled to at least as much protection as convicted prisoners, so the protections of the Eighth Amendment would seem to establish a floor of sorts." The Kost court, however, stated that such

claims of pretrial detainees arise under the Due Process clause. Id. at 188. Setchko's allegation that he was subjected to cruel and unusual punishment during the course of his arrest is consumed by his Fourteenth Amendment claim and does not warrant an individual cause of action under the Eighth Amendment.

C. § 1985(3) & § 1986

In a § 1985(3) action, the complaint must allege that the defendants conspired "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protections of the law, or of equal privileges and immunities under the laws." Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971). The complaint must also assert that the conspirators: did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was "injured in his person or property" or "deprived of having and exercising any right or privilege of a citizen of the United States." Id.

In order to satisfy the first element, Setchko must allege supporting facts that tend to show an unlawful agreement. See Drusky v. Judges of Supreme Court, 324 F. Supp. 332, 333 (W.D. Pa. 1971). Setchko makes no mention of any conspiracy behind the Defendants' actions, nor does he allege any facts that would tend to show such an agreement. Furthermore, in order to satisfy the second element, there must be some racial, or perhaps class-based, "invidiously discriminatory animus behind the

conspirator's action." See Griffin, 403 U.S. at 102. Setchko's § 1985(3) claim also fails because he has not alleged any basis for race or class based discrimination. Accordingly, Setchko's § 1985(3) claim is dismissed.

In addition, a § 1986 claim is predicated on a § 1985 claim; failure to state a claim under § 1985(3) precludes a § 1986 claim. See Clark v. Clabaugh, 20 F.3d 1290, 1295 & n.5 (3d Cir. 1994). Consequently, Setchko's § 1986 claim also is dismissed.

D. Governmental Immunity

The Political Subdivision Tort Claims Act, 42 Pa. Con. Stat. Ann. §§ 8541-8564 (West 1998), creates a shield of governmental immunity against damages resulting from injuries to a person or property caused by a local agency or an employee of a local agency. Mascaro v. Youth Study Ctr., 523 A.2d 1118, 1120 (Pa. 1987). Exceptions to this immunity include those situations where: (1) the damages would be recoverable under common law or (2) the injury was caused by a negligent act of the local agency or its employee and falls into one of the eight enumerated categories. 42 Pa. Con. Stat. Ann. § 8542. Negligent acts "shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct." Id., § 8542(a)(2).

Assault and battery, false arrest, false imprisonment, malicious abuse of process, malicious prosecution, intentional

infliction of emotional distress, defamation of plaintiff's good name, reputation and character, and other "willful, wanton, and reckless misconduct" qualify as intentional torts. These claims are therefore precluded by Lower Southampton's governmental immunity.

Setchko also asserts a claim of negligent infliction of emotional distress. Such a claim will be rejected when it appears to be nothing more than an attempt to circumvent governmental immunity. Zernhelt v. Lehigh Co. Office of Children & Youth Servs., 659 A.2d 89, 90-91 (Pa. Commw. Ct. 1995). While Setchko has couched this claim in the term "negligence," the acts he has alleged are clearly intentional and this claim will be dismissed.

E. Abuse of Process & Malicious Prosecution by Bowman & Pennington

Local agency employees have official immunity from suits "to the same extent as [their] employing local agency." 42 Pa. Con. Stat. Ann. § 8545. This official immunity, however, does not extend to acts that constitute "willful misconduct," id. § 8550. Willful misconduct is defined by section 8550 of the Act as "synonymous with the term 'intentional tort.'" Kuzel v. Krause, 658 A.2d 856, 859 (Pa. Commw. Ct. 1995). Official immunity under the Act does not extend to Setchko's claims against Bowman and Pennington for malicious abuse of process and malicious prosecution, as these claims are intentional torts amounting to

"actual malice" or "willful misconduct." Id. at 859. Therefore, the Court must look to the sufficiency of Setchko's allegations.

In order to sufficiently plead a common law malicious prosecution claim, the plaintiff must allege that: (1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in plaintiff's favor; (3) the proceeding was initiated without probable cause; and (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice. Haefner v. Burkey, 626 A.2d 519, 521 (Pa. 1993). According to Setchko's Complaint: (1) he was arrested; (2) the proceedings against him were eventually terminated in his favor; (3) the arrest was conducted without probable cause; and (4) for an improper purpose. Therefore, Setchko's allegations, along with all reasonable inferences that can be drawn therefrom, indicate that he has sufficiently pleaded all four elements of his malicious prosecution claim, at least to survive a motion to dismiss.

In order to state a claim for malicious abuse of process, the plaintiff must demonstrate that the defendants: (1) used a legal process against [the plaintiff]; (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to [the plaintiff]. General Refractories Co. v. Liberty Mut. Ins. Co., No. CIV. A. 97-7494, 1999 WL 1134530, at *4 (E.D. Pa. Dec. 9, 1999). Accepting the

allegations in the complaint as true, as well all reasonable inferences that can be drawn therefrom, Setchko appears to have sufficiently pleaded the elements of malicious abuse of process. He alleges that: (1) criminal proceedings were initiated against him; (2) these proceedings were improper and without the requisite probable cause; and (3) he sustained harm as a result of these criminal proceedings.

F. 42 U.S.C. § 1983

To properly plead a § 1983 claim, Setchko must allege: (1) conduct committed by a person acting under color of state law; and (2) that the alleged conduct deprived plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. Gruenke v. Seip, 225 F.3d 290, 298 (3d Cir. 2000). In his Complaint, Setchko repeatedly and explicitly alleges that the Defendants were acting under the color of state law. Defendants dispute, however, that Setchko sufficiently pleaded an allegation of a constitutional deprivation necessary to support his § 1983 claims in Counts III and IV.

Counts III and IV incorporate by reference each and every allegation contained in the foregoing paragraphs. In Count I, Setchko alleges deprivations of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights. These allegations, incorporated by reference, are sufficient to sustain his § 1983 claims in the subsequent Counts.

The Defendants focus almost exclusively on Setchko's equal protection claim and argue that his failure to adequately plead that claim precludes his bringing a § 1983 claim in Counts III and IV. The Complaint lacks the necessary allegations to plead an equal protection claim. Specifically, Setchko fails to allege that:

> (1) [he] compared with others similarly situated was selectively treated; and
> (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations such as race or religion, to punish or inhibit the exercise of constitutional rights, or by malicious or bad bad faith intent to injure the person.

Homan v. City of Reading, 963 F. Supp. 485, 490 (E.D. Pa. 1997), nor do the facts alleged support such an inference. Accordingly, Setchko's § 1983 claims are dismissed to the extent that they rely upon the equal protection clause. Setchko may, however, proceed upon his other § 1983 claims based upon the Fourth, Fifth, Sixth and Fourteenth Amendments.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALEXANDER SETCHKO	:	CIVIL ACTION
	:	
v.	:	
	:	
TOWNSHIP OF LOWER SOUTHAMPTON, et al.	:	No. 00-3659

O R D E R

AND NOW, this day of March, 2001, upon consideration of the Motion to Dismiss of Defendants, the Township of Lower Southampton ("Lower Southampton"), the Lower Southampton Township Police Department ("Police Department"), Police Officer Matthew Bowman ("Bowman") and Police Corporal Pennington ("Pennington") (Doc. No. 3) and the Response thereto of Plaintiff, Alexander Setchko ("Setchko"), it is ORDERED:

1. The Motion to Dismiss is GRANTED IN PART.

a. All claims against the Police Department are DISMISSED;

b. the claims under 42 U.S.C. §§ 1985(3) and § 1986 (1994) in Count I of the Complaint are DISMISSED;

c. the claims under the Eighth Amendment to the U.S. Constitution in Count II of the Complaint are DISMISSED;

d. all state tort claims against Lower Southampton in Count II of the Complaint are DISMISSED;

e. all claims based upon Equal Protection in Counts III and IV of the Complaint are DISMISSED.

2. The Motion to Dismiss is DENIED IN PART as to:

a. the malicious abuse of process and malicious prosecution claims against Bowman and Pennington in Count II of the Complaint; and

b. all 42 U.S.C. § 1983 (1994) claims in Counts III and IV of the Complaint not based upon Equal Protection.

BY THE COURT:

JAMES McGIRR KELLY, J.